VERMONT SUPERIOR COURT
CHITTENDEN UNIT
CIVIL DIVISION

JACK EDWARD DAGGITT, et al., Plaintiff v. CITY OF BURLINGTON, Defendant	VERMONT SUPERIOR COURT FILED Docket No. 175-2-19 Cncv MAR 18 2019 CHITTENDEN UNIT

RULING ON MOTION FOR PRELIMINARY INJUNCTION

This case is brought by several Burlington residents seeking to challenge the City's decision to redesign City Hall Park. The complaint alleges violations of the City Charter and a violation of the 14th Amendment and 42 U.S.C. §1983. They seek a court order requiring the City to submit the question to the voters. Plaintiff filed a motion for a preliminary injunction, and a hearing on that motion was held on March 8. Post-hearing memos were complete March 15.

Discussion

The "purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." Benisek v. Lamone, 138 S. Ct. 1942, 1945 (2018)(citation omitted). It is "an extraordinary remedy never awarded as of right." Id. at 1943; Taylor v. Town of Cabot, 2017 VT 92, ¶ 19, 205 Vt. 586. The factors the court must consider are "(1) the threat of irreparable harm to the movant; (2) the potential harm to the other parties; (3) the likelihood of success on the merits; and (4) the public interest." Taylor, 2017 VT 92, ¶ 19. Although federal law requires a movant to show all of these criteria have been met, Vermont has

a slightly more flexible standard. *Compare* Benisek, 138 S. Ct. at 1944 (movant must show "likelihood of success on the merits," that he or she "is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.") *with* Taylor, 2017 VT 92, ¶ 19 n. 3 (permitting relief even in "cases in which the court cannot definitively conclude that the movant is likely to prevail on the merits, but the balance of other factors tips strongly in favor of an injunction").

I. Likelihood of Success

The first question is whether the Plaintiffs have shown a likelihood of success on the merits.

A. City Charter Claims

The project at issue is the proposed redesign of Burlington's City Hall Park. This project has been in the works for a number of years and has been the subject of over 25 public meetings. It involves removing 21 of the existing 51 trees and replacing most of them, so the final tree count would be 48 rather than 51. It also involves upgrades to the stormwater system along the park, reconstruction of sidewalks, installation of a new fountain, plazas, rain gardens and retaining walls, and replacement of lighting. Exs. D-5 and Testimony of Cindy Wight.

The City obtained a zoning permit in June of 2018 to do the construction this spring/summer, which was not appealed, and it went out for bids in January. The Parks and Recreation Department hopes to select a bidder, get approval for specific funding sources from the City's Attorney and Chief Administrative Officer, get approval from the Board of Finance, and finally get City Council approval at the March 25 meeting so that work can begin soon. The advisory Parks and Recreation Commission unanimously supports the project.

Plaintiffs argue that Section 63 of the City Charter requires voter approval before the City may "pledge the credit" of the City. Motion, pp. 11-13; 24 App. V.S.A. ch. 3, §63. In fact, what it says is that voters may vote to give authority to pledge the credit of the City, but it does not say the City is required to obtain such a vote in every instance. Surely, for example, the City can use a credit card to buy office supplies without voter permission. This provision cannot reasonably be read to require voter permission for all such acts by the City.

The City acknowledges, however, that there is another provision not originally cited by Plaintiffs that does restrict when the City can pledge its credit -- Section 62. That section provides for certain specific situations that do not require voter approval, one of which is annual borrowing of up to $2 million for working capital and capital improvements. Id. § 62(f)(1). Voters have the ability to challenge City Council resolutions to that effect by petition filed within 44 days of the resolution. Id. §§ 62(f)(2) and 63(b). Here, the evidence is that the City approved issuance of bonds ("General Fund Public Improvement Bonds") for such a $ 2 million capital fund last June, some of which is still available to potentially be spent on this project. Ex. D-16.[1]

The evidence also established that the City has funds that were previously approved by the voters. Those include $500,000 from a TIF bond for "stormwater features along the block of Main Street that borders City Hall Park." Ex. D-3. The City was also authorized by the voters in March 2018 to borrow up to $6,100,000 to fund "capital improvement infrastructure projects. . . in furtherance of the City's ten-year capital plan." Ex. D-9. That ten-year plan, entitled An Infrastructure Plan for a Sustainable City, includes the rebuilding of City Hall Park. Ex. D-15 at 15. The City passed a resolution in March of 2018, acting on the voters' approval, to issue the $6,100,000 bonds. Ex. D-11. The planned allocation of estimated bond proceeds includes over

[1] The court cites specific exhibits in this decision but will not refer to specific testimony in support of the various facts discussed. The testimony of both the City's Director of Parks, Recreation and Waterfront and the Chief Administrative Officer, however, also supported these facts.

$1 million for projects including City Hall Park. Ex. D-12, App. A-1. There are also funds available from the Penny for Parks fund, and a $1 million donation has been pledged to the project. Exs. D-2, D-8. Plaintiffs argue that the ballot items approved by the voters did not contain enough detail to let the voters know what they were voting on, such as what the "ten year capital plan" was, citing Addison Cty. Cmty. Action Grp. v. City of Vergennes, 152 Vt. 161 (1989). That case notes that a ballot item need not contain every detail: it is adequate if "enough is stated to show its character and purpose." Id. at 167. Here, it would not have been possible to list every aspect of the 28-page ten-year plan on a ballot. *See* Ex. D-15. Even the Executive Summary runs four pages. Id. at 3-6. Voters have a certain obligation to educate themselves about what they are voting on: not every detail can be put on the ballot.[2]

Plaintiffs also argue that Section 213 of the Charter requires voter approval before the City may issue bonds for the "acquisition and improvement of land and facilities for public Parks and Recreation Programs." Motion, pp. 13-14. That provision provides that the advisory Park and Recreation Commission may request a bond vote for such a purpose. It does not, however, bar the City from spending other funds on parks without voter approval.

Although Plaintiffs appear to believe that more money will be spent on this project than has been authorized from the various sources testified to by the City witnesses, no firm evidence was presented as to the amount of money currently expected to be used on the project. A June 2018 resolution of the City Council cites expected costs of $3,500,000.[3] *See* Ex. D-7. The

[2] Plaintiffs also argue that the plan itself was misleading because it suggested work was to be done in 2017, and the vote in question was in 2018. The court believes voters are smart enough to have understood that the plan had not yet been fully realized when they voted in 2018.

[3] Plaintiffs allege in the complaint and argue in their post-hearing memorandum that the figure is higher, but they presented no evidence to support such a claim.

amounts approved from all the sources discussed above exceed that amount. There is therefore no proof that the City plans to spend any funds beyond those properly approved.

The last claim regarding the Charter relates to Section 6. Motion, pp.14-17. Plaintiffs contend that this section required the Mayor to place a vote on the park redesign on the ballot because a petition was signed by five percent of the voters requesting such a vote. However, Plaintiffs presented no evidence at the hearing that 5 % of the voters signed a petition.[4] While two of the plaintiffs testified that there were 3,000-3,300 signatures, no evidence was presented as to the current number of voters in the City. The court therefore has no evidence on which to assess this claim.

B. 14th Amendment Claims

The constitutional claim is that the City has intentionally deprived the plaintiffs of their right to vote. Motion, pp.17-20. This rests on the other claims, in that the right Plaintiffs point to arises from the Charter. It therefore rises or falls with them. There is thus no likelihood of success on this claim.

II. The Other Factors

As noted above, Vermont allows the issuance of a preliminary injunction even when the likelihood of success is not strong if the other factors weigh in favor of injunctive relief. Here, the court concludes that the public interest weighs in favor of the City. This project has been in the works for a number of years and has been the subject of many public meetings. The City Council has approved various resolutions for proceeding with the project, and funds have been allocated through various sources over several years. The primary objection of the Plaintiffs is that they don't want trees cut, based both upon concerns over climate change and their own

[4] The only document mentioning the issue is Exhibit 10, which was admitted by stipulation without any testimony to explain it. It is unsigned, and the court cannot tell whether it was a draft, whether it was prepared by the City prior to knowing the status of the petition, or perhaps a proposed document submitted to the City Council by Plaintiffs.

emotional attachments to the park in its current iteration. The evidence is that the current 51 trees will be replaced by 48 trees. While they will no doubt be smaller trees when planted, and the court appreciates the importance of public green spaces to the quality of life in urban areas, the reduced number and size of trees can hardly be considered irreparable harm. To the extent that Plaintiffs also object to the increased paved areas, that too does not meet the test for irreparable harm. While increased impervious areas can lead to more runoff and water pollution, no evidence was presented that the changes proposed here would have any measurable impact on Lake Champlain or other water sources.

"[T]he violation of a plaintiff's constitutional rights is itself a sufficient irreparable injury to support a preliminary injunction." Taylor, 2017 VT 92, ¶ 41. However, there is no evidence to support a finding of any constitutional violation here. For all of these reasons, the court concludes that Plaintiffs have not established entitlement to the extraordinary reedy of a preliminary injunction.

Order

The motion for a preliminary injunction is denied. Based upon the evidence presented, the court does not find a reasonable likelihood that Plaintiffs will succeed on the merits of their claims. The City shall file its answer or motion to dismiss within the time provided by the rules. The parties shall file a discovery schedule within 30 days of any answer.

Dated at Burlington this 18th day of March, 2019.

Helen M. Toor
Superior Court Judge